costs down to the time they obtained the declaratory order to the effect that the premises were part of the estate. Thereafter the defendants should have their taxed costs and I would vary the order of 16th May, 1962, accordingly.

There is one further point I wish to mention and that is the great mass of unnecessary and irrelevant material that has been included in the Record of Appeal. Of the last 87 pages only two pages (pages 123 and 124) have any bearing at all on the questions at issue and I think the costs of this surplus matter should be disallowed.

Hill J.A.: I agree with the learned Chief Justice that this appeal should be allowed with costs. I also agree with the apportionment of costs proposed by him and with the disallowance of costs occasioned by surplus matter included in the Record of Appeal.

I do not wish to add anything except to say that, whatever the position may be with regard to a statutory tenancy, it seems clear that there was a contractual monthly tenancy which has never been terminated by a proper notice and that this tenancy still exists today.

Barakbah J.A.: I have had the advantage of reading my Lord Chief Justice's judgment with which I entirely agree.

In my opinion the main issue in this case was whether first defendant had acquired the right to possession of premises No. 111 Pitt Street, Penang, subsequent to the death of her husband, the said E. K. Ghany. It was admitted that the said Ghany deceased was tenant of the said premises at the time of his death. On his death the tenancy became part of his estate. The death of either party will not determine such tenancy. See *Woodfall's* Landlord and Tenant 26th Ed. Vol. 1 p. 293. The first defendant applied for letters of administration but at the time of these proceedings the grant had not yet been extracted. She took possession of the said premises and sublet them to the second and third defendants. Plaintiffs then applied to the Court that she be appointed to represent the deceased for the purpose of these proceedings and the application was granted.

The trial Judge's view was that until the first defendant had extracted the grant of letters of administration, she had no power to deal with the said tenancy by sub-letting it. Had she taken out the grant of letters of administration her title as administratrix would have related back and she would as such have been entitled to succeed to the contractual tenancy of her husband. In my opinion the mere fact that the grant of letters of administration had not yet been extracted does not necessarily mean that, to all intents and purposes, the first defendant must be regarded as a complete stranger, if the doctrine of relation back has any effect and meaning.

Now the plaintiffs purported to claim possession of the said premises from the first defendant without giving proper notice to quit. The letter dated 2nd July, 1959 written by the plaintiffs' solicitor to the first defendant was not a notice to quit. According to *Woodfall* on Landlord and Tenant 26th Ed. Vol. 1 page 980 paragraph 2127:—

> "A notice to quit is not rendered unnecessary by the death of the landlord, or of the tenant, nor by an assignment of the term, or of the reversion. In such cases notice to quit should be given by or to the person or persons for the time being legally entitled to the term, or to the reversion, as the case may be. In the case of the party dying intestate and no letters of administration having been taken out the notice should be served on the Probate judge under section 9 of the Administration of Estates Act, 1925."

According to the authorities quoted by my Lord Chief Justice a notice to quit could have been served on the first defendant, thereby determining the tenancy. It would appear that this had not been done.

With regard to the second and third defendants assuming that they were sub-tenants, notice on them would be irregular as a notice to quit given by the landlord should be given to his immediate tenant or to his assignee but not to a sub-tenant. — *Pleasant, Lessee of Hayton* v. *Benson.* (7)

For the reasons above stated I would allow the appeal with costs in terms as proposed by my Lord Chief Justice.

Appeal allowed.

Solicitors: *S. Thillaimuthu; Ong Huck Lim & Co.*

Re CHOW KIM LIN

[R. Cr. J. (Ong J.) November 17, 1962]

[K.L. — Criminal Revision No. 14 of 1962]

Criminal Procedure — Preliminary inquiry — Functions of Magistrate — Criminal Procedure Code (Cap. 6), Ch. XVII, s.173(f).

In a preliminary inquiry a Magistrate ought to commit when the evidence of credible witnesses which if believed would sustain a conviction.

Penal Code, s.376 — Rape — Chemist's report.

Cases referred to:—

(1) *Theopillai* v. *Public Prosecutor* [1956] M.L.J. 177.

(2) *Re Osman bin Abdullah* [1954] M.L.J. 237.

(3) *Ramgopal Ganpatrai Ruia* v. *State of Bombay* A.I.R. 1958 S.C. 97; [1958] S.C.R. 618.

(4) *Queen Empress* v. *Namdov Satvaii* I.L.R. 11 Bom. 372.

CRIMINAL REVISION.

Ong J.: On October 20, 1962 a Magistrate holding a preliminary inquiry into a charge of rape under section 376 of the Penal Code made an order discharging the person accused of that offence. The grounds of decision ran to eleven pages and took time to write. On November 15 the Public Prosecutor filed a petition for revision. This, of course, is the proper step to take, having regard to what was said by the Court of Appeal in *Theopillai* v. *Public Prosecutor* (1).

Having read the grounds of decision I called for the depositions and for one exhibit in particular, namely, the certificate of the Government Chemist. That report, even without anything more, affords positive material corroboration of the complainant's evidence, and was either not read or understood by the Magistrate when he said there was "no evidence of seminal stains" on the complainant's clothing. Moreover spermatozoa were found in the vaginal swab. From time to time in the greater part of the grounds of decision the Magistrate himself posed questions indicating that he viewed with cynical scepticism the evidence of the complainant as to absence of consent. This appears to me to be pre-eminently a case of failing to see the wood for the trees. Surely the first question one must ask oneself is whether this woman, or any woman, would be a willing party to an act of intercourse with a complete stranger on the cement floor of her office during working hours?

I am satisfied that the learned Magistrate here was under a complete misapprehension as to the functions of a magistrate conducting a preliminary inquiry under Chapter XVII of the Criminal Procedure Code, which he confused with the duties of a magistrate trying a case within his jurisdiction. He was in effect applying the provisions of section 173(f) of the Code as in a summary trial. The dicta of Bellamy J., in *Re Osman bin Abdullah* [2] has drawn a sufficiently clear line for magistrates to follow and I need not enlarge upon it. In a more recent decision of the Supreme Court of India, *Ramgopal Ganpatrai Ruia* v. *State of Bombay* [3] where it was stated that observations of the Indian Courts about the powers of a committing magistrate, appearing in conflicting reported cases, have to be read in the light of the facts and circumstances of each particular case, the Court went on to approve the decision of West J. in *Queen Empress* v. *Namdev Satvaji* [4] where he said:

> " What are 'sufficient grounds for committing' is not in any way defined, but it is manifest that they are not identical with grounds for convicting, since taken in that sense, the provisions would enable the Magistrate virtually to supersede the Court of Session to which the cognizance of the case for actual trial belongs. The true principle appears to be that expressed in the English statute. The Magistrate ought to commit when the evidence is enough to put the party on his trial, and such a case obviously arises when credible witnesses make statements which, if believed, would sustain a conviction. The weighing of their testimony with regard to improbabilities and apparent discrepancies is more properly a function of the Court having jurisdiction to try the case."

I accordingly set aside the order of discharge, and direct that the Magistrate do frame a charge under section 376 of the Penal Code and commit the accused for trial thereon before the Court of a Judge.

Order accordingly.

TAY CHONG BENG & ANOR. v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Hill and Barakbah JJ.A.) December 3, 1962]

[K.L. — F.M. Criminal Appeal No. 33 of 1962]

Penal Code, ss.109, 411 and 412 — Stolen property — Dishonestly receiving, in the commission of gang-robbery — Abetment — Accomplice — Corroboration — Evidence Ordinance, 1950, s.114, illustration (a).

The 1st appellant was charged with dishonestly receiving stolen property to wit 315 sacks of tin ore in the commission of gang robbery under section 412 of the Penal Code. The 2nd appellant was charged with abetting the said offence punishable under sections 109 and 412 of the said Code. Both appellants were convicted by the learned trial judge. The 1st appellant was sentenced to 5 years' and the 2nd appellant to 4 years' imprisonment. Both appellants appealed against conviction. It was argued for the 1st appellant that (1) no *prima facie* case had been made out against him at the close of the prosecution case as there was no evidence that he received it or that he had knowledge that the offence in the course of which it had been stolen was the offence of gang robbery, (2) the trial judge misdirected himself on the question of burden of proof. It was argued for the 2nd appellant that the two robbers who gave evidence were accomplices and their evidence should not have been accepted without the learned trial judge administering to himself a caution as to the necessity for corroboration of their evidence in a material particular implicating the appellant.

Held: (1) at the close of the prosecution case the evidence against the 1st appellant if true was overwhelming and the learned trial judge had no option but to say that there was a case to answer;

(2) as the appellant did take actual possession of the ore and had control over it, that amounted to receiving the stolen ore. It was not necessary as a matter of law that he should have exclusive possession of the ore;

(3) the knowledge that the course by which it was stolen was gang robbery was presumed under section 114, illustration (a) of the Evidence Ordinance;

(4) the learned trial judge had not misdirected himself. His direction complied with what the Court of Appeal said in *Chan Chwee Kong* v. *Public Prosecutor* [6];

(5) the learned trial judge did warn himself that the two robbers were accomplices and that their evidence should be treated with great caution. In this case there was corroboration implicating the appellants.

Cases referred to:—

(1) *Gleed* 12 Cr. App. R. 32, 33.
(2) *Seiga* 45 Cr. App. R. 26, 30.
(3) *Berger* 11 Cr. App. R. 72, 74.
(4) *Wiley's Case* 4 Cox C.C. 414; (1850) 2 Den. 37.
(5) *Chandra Pal* v. *State* A.I.R. 1954 All. 684, 687.
(6) *Chan Chwee Kong* v. *Public Prosecutor* [1962] M.L.J. 307, 308.

COURT OF APPEAL (CRIMINAL).

S. M. Yong (*J. H. Yong* with him) for the 1st appellant.

D. R. Seenivasagam for the 2nd appellant.

H. Sankey (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Thomson C.J.: This appeal arose from an incident of a type which, though common elsewhere, is fortunately not yet very common in this country.